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No. -

IN THE

Supreme Court of the United States

October Term, 1988

JOHN SMITH, *Petitioner.*

v.

JANE DOE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

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QUESTIONS PRESENTED

Do *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth* preclude a state court, under any and all circumstances, from taking into account, on a case by case basis, the interests of a father in his unborn child when the mother of the unborn child wants an abortion?

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PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS

Petitioner John Smith[1] respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Indiana Court of Appeals, entered in the above-entitled proceeding on October 24, 1988, which was refused review by the Indiana Supreme Court on February 9, 1989.

OPINIONS BELOW

The Order of the Indiana Supreme Court denying transfer of this case to itself is reprinted in the appendix hereto, p. 4a, *infra*.

[1] John Smith and Jane Doe are pseudonyms approved by the Indiana Court of Appeals. Under Indiana statutory law, and by order of the Indiana courts, the record of the trial court hearing has been sealed and pseudonyms employed. The parties are natural persons within the jurisdiction of Indiana courts.

The Memorandum Decision and Judgment of the Indiana Court of Appeals (not reported) is reprinted in the appendix hereto, p. 1a, *infra*.

The Findings of Fact, Conclusions of Law, and Order of the Vigo [County, Indiana] Circuit Court, Juvenile Division, *sub nom. in the Matter of Unborn Child H.*, is reprinted in the appendix hereto, p. 10a, *infra*.

JURISDICTION

Petitioner brought this action to establish himself as the father of the unborn child of Petitioner and Respondent and to obtain an injunction to prevent her from obtaining an abortion. A permanent injunction was issued by the Vigo Circuit Court.

The Indiana Court of Appeals, on October 24, 1988, reversed the judgment of the Vigo Circuit Court, which had been based on a consideration of both the Respondent's interests in obtaining an abortion and the Petitioner's interests in his unborn child. The Court of Appeals relied on two prior Indiana decisions in similar cases which held that the decisions of this Court in *Roe v. Wade*, 410 U.S. 113 (1973), and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52 (1976), precluded any judicial consideration of the father's interests when a woman chooses to have an abortion.

On February 9, 1989, the Indiana Supreme Court denied transfer of this case to itself for review.

The jurisdiction of this Court to review the judgment of the Indiana Court of Appeals is invoked under 28 U.S.C. § 1257(3), based on the assertion by the Respondent of a right to abortion under the Fourteenth Amendment of the Constitution.

CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV

> SECTION 1. All persons born or naturalized in the United States . . . are citizens of the United States . . . . No State shall make or enforce any law which shall

abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, 1.

STATEMENT OF THE CASE

On April 4, 1988, a young, unmarried man, John Smith (hereafter the "Father"), filed a Petition to Establish Paternity in the Vigo Circuit Court, Juvenile Division. He alleged that he was the father of Unborn Child H.,[2] who was approximately ten weeks of gestational age and was being carried by the young, unmarried mother, Jane Doe (hereafter the "Mother").

On the same date, the Father petitioned the court for an emergency hearing, alleging that the Mother had expressed an intention to abort their child. Also on that date, the Father moved the court for a Temporary Restraining Order, which was granted, restraining the Mother from obtaining an abortion for ten days.

A hearing was set for April 7, 1988, at which time evidence was presented and argument of counsel heard. At the beginning of the hearing, the Court renewed the Temporary Restraining Order, following questions as to the procedural propriety of the first order. The father and his three witnesses gave uncontroverted testimony. The Mother refused to participated in the hearing, beyond mere attendance, on the ground that the holding of this Court in *Roe v. Wade*, 410 U.S. 113, deprived the trial court of "jurisdiction" to consider either her decision to have an abortion or the Father's interests in his unborn child.

In a ruling dated April 8, 1988, the trial court issued its Findings of Fact, Conclusions of Law, and an order.

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[2] This case was styled *In the Matter of Unborn Child H.* in the trial court. In the Indiana Court of Appeals, the case was renamed *Jane Doe v. John Smith* by agreement of the parties and approval of the appellate court.

The trial court found that the Father was the natural, biological father of the unborn child.[3] In its Conclusions of Law, the trial court concluded that *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth* did not preclude the balancing of the Father's interests in his unborn child with the Mother's interests in aborting their unborn child. The trial court ordered that "[t]he Mother is hereby permanently restrained from having an abortion to terminate the unborn child she is now carrying . . . ." At the request of the parties, the final hearing on the paternity action was continued until after the birth of the child.

The Mother sought expedited review in the Indiana Supreme Court, seeking to have that court declare that the trial court was without jurisdiction because of the holdings of this Court in *Roe v. Wade*, 410 U.S. 113, and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, and that, if Jane Doe had already or should violate the permanent injunction of the trial court, she would not be found in contempt for such action.

Before the Indiana Supreme Court could consider the appeal, the Mother aborted their unborn child in knowing and willful violation of the court order, as admitted by the Mother in her Notice to the Indiana Supreme Court.[4] Consequently, expedited appeal was denied by the Indiana Supreme Court and the case was sent to the Indiana Court of Appeals for review.

In the Indiana Court of Appeals, the judgment of the trial court was reversed. The appellate court, in its Memorandum Decision, relied on two prior Indiana cases involving fathers' assertion of interests in abortion cases. The cases, *Conn v. Conn*, 525 N.E.2d 612 (Ind. Ct. App. 1988), *aff'd and opinion*

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[3] Further findings of the trial court are discussed *infra* in the Reasons for Granting the Writ.

[4] Despite the fact that the abortion has already occurred, this case is clearly within the exception to the mootness doctrine for matters "capable of repetition yet evading review," as that doctrine is employed in abortion cases. *Roe*, 410 U.S. at 125. In both *Roe* and *Doe v. Bolton*, 410 U.S. 179, 187 (1973),

(footnote continued)

of app. ct. adopted by order, No. 73S01-8807-CV-631 (Ind. July 15, 1988), *cert. denied*, 57 U.S.L.W. 3347 (U.S. Nov. 14, 1988) (No. 88-347), and *Doe v. Smith*, 527 N.E.2d 177 (Ind. 1988), relied on this Court's decisions in *Roe v. Wade*, 410 U.S. 113, and *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, to hold that such a consideration of the fathers' interests violated the constitutional rights of the pregnant women involved.

Thus, the Indiana appellate courts' interpretation of the scope of a woman's constitutional right to abortion set forth in *Roe* and *Danforth* precluded the recognition of John Smith's interests in his unborn child. As noted above, this federal constitutional issue was the central focus of this case at every stage.

REASONS FOR GRANTING THE WRIT

I. The question of the appropriate consideration of a father's interests in his unborn child is an important one affecting millions of fathers.

This case presents a matter of great public importance. In every case where a woman seeks an abortion, there is a father

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Footnote 4 continued

this Court granted review of cases to women who had already completed their pregnancies. As explained by Justices Scalia and O'Connor, concurring in the recent case of *Honig v. Doe*, 108 S.Ct. 592 (1988), abortion jurisprudence "differ[s] from the body of our mootness jurisprudence . . . in dispensing with the same-party requirement entirely, focusing instead upon the great likelihood that the issue will recur *between the defendant and the other members of the public at large* without ever reaching us." *Id.* at 609 (emphasis in original). In the instant case, the same principle is applicable. Although the Father and the Mother may never again have occasion to litigate between them her right to abortion, there is at least as great a possibility that she will again be subject to such an action or that he will again seek to initiate such an action in relation to another partner as there was that Jane Roe would again be subject to the strictures of Texas abortion laws in *Roe*. In the public, a substantial number of such cases have occurred. With some million and a half abortions per year in the United States, the interests of many other fathers are at issue in cases with fact situations similar to the case at bar, which never come to court because of holdings such as that by the Indiana Court of Appeals in this case. This is a matter of great public importance concerning an unsettled area of the law which requires resolution by this Court.

of the child involved. Over one and a half million abortions are performed annually in this country. In each of these cases, the interests of fathers in their children are potentially at stake. Of course, actions such as the present one would only be undertaken by a father with notice of the mother's intent to abort and who wished to assert his interests.

However, *Roe* and *Danforth* are viewed by the Indiana courts to have forever barred from the courthouse fathers who would assert interests in their unborn children. And they are barred under any set of facts. Regardless of the mother's motivation, whether it be gender selection of her child, revenge or blackmail against the father, or some immature and near-frivolous reason — as in the case at bar — she may obtain an abortion without any consideration of the father's interests. It matters not what pledges she has made to him concerning the child, nor the degree of bonding already occuring between the father and child, nor his resources for providing for the child when born, nor the length of time she has carried the child, nor any other reason. She may have, under the Indiana courts' interpretation of the current state of abortion law in this country, an abortion virtually on her demand throughout pregnancy, with no consideration of his interests. Even in a situation where an unborn child is the only child that the father had ever procreated and would be able to procreate and where the interests of the mother in aborting the child are comparatively much weaker, the Indiana appellate courts, relying on *Roe* and *Danforth*, have declared that her right is absolute as against the father.

No comparable grant of authority exists elsewhere in the law: rather, where powerful interests compete, they are universally balanced. In a society adhering to the principle of "equal justice under the law," such absolute, unreviewable power is unjust.

As a result, fathers are disenfranchised from the judicial system. Counsel for Petitioner have had numerous requests from fathers about the country, wanting to know if their interests may be considered in abortion cases. The answer, at least

in Indiana, has to be that fathers' interests can no longer be considered.

Because the bonding process begins before birth, this answer is distressing to fathers frantic to save the lives of their unborn children. But the Indiana appellate courts, relying on an erroneous interpretation of *Roe* and *Danforth*, have slammed the doors on fathers seeking to exercise one of the most powerful biological and psychological desires of all, the desire to protect one's children. This desire, long exalted by society in its ideal portrayals of fatherhood and celebrated nationwide on Father's Day, is consigned to the judicial dustbin by the Indiana appellate courts. This result was viewed by the Indiana appellate courts as compelled by *Roe* and *Danforth*.

As noted below, the question of whether paternal interests may be considered in the abortion context was not resolved by *Danforth*, and, if it was, it was resolved unjustly. This national tragedy of uniform denial of fathers' interests in the abortion context needs to be considered by this Court. It needs to be made clear that the Constitution of the United States does not preclude the judicial consideration of both the fathers' interests and the mothers' interests.

II. Based on this Court's decisions in *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*, the Indiana Court of Appeals erroneously determined that the interests of the father of an unborn child may receive no judicial consideration when the mother of the unborn child desires to obtain an abortion.

The Indiana Court of Appeals, following prior holdings by itself and by the Indiana Supreme Court, which in turn relied on *Roe* and *Danforth* for the proposition that it is unconstitutional to consider a father's interests in an abortion context, reversed the trial court. Petitioner contends that this judgment is based upon an erroneous understanding of *Roe* and *Danforth*, and, if not, then *Roe* and *Danforth* are themselves erroneous.

A. The State has an interest in protecting the interests of fathers in their unborn children.

A father is the biological contributor of half of an unborn child's genetic material. He thus has a powerful biological tie to the unborn child. It is his child as well as the child of the mother. This biological tie creates powerful psychological and emotional bonds. A good father loves his children, desires to protect and provide for them, desires their companionship, wants to care for them, and desires to guide their education and general rearing to assure that they fulfill their greatest potential. As a society we laud good fathers and encourage young men to develop these nurturing attributes. Legally, we enforce the minimal obligations on those fathers who do not live up to this societal ideal. Society has a strong interest in promoting the ideal of fatherhood, so that there will be another generation to continue our culture and so that the next generation is cared for.[5]

Thus, when fathers seek to protect their children from peril, whether the children are born or unborn, and to provide for them, society — and the courts — should encourage such attitudes. In an era of increasing strains on traditional parent/child and family relationships, the desire of a state to promote the ideals of fatherhood become especially compelling. Indiana courts have sought to do this, but have felt restrained by *Roe* and *Danforth*.

Society also has a strong interest in protecting the interests of its citizens. The traditional means of protecting such interests has been by judicial action. Yet, if the Indiana Court of Appeals' interpretation of *Roe* and *Danforth* is correct, the interests of a whole class of citizens, fathers of unborn children, are completely disregarded.

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[5] Of course, society has a powerful interest in promoting the ideal of nurturing mothers, as well, for similar reasons. Petitioner would argue that the current practice of abortion on demand is antithetical to such societal interests.

Society has a further interest in peaceful resolution of competing interests. Again, this is normally done in the courts. As a society, we do not want people to take matters into their own hands so that might makes right. Rather, we have agreed to be ruled by law, under the principle of "equal justice under the law." To lock the court doors to the interests of all fathers of unborn children is to make a mockery of the rule of law and equal justice and to invite nonpeaceful, private resolution of disputes over competing interests. This flies in the face of our tradition of liberal democracy under law.

The power of a father's interests in the care, custody, control, and companionship of his child is demonstrated by the fact that, as against the state, his interests constitute fundamental rights, which may not be abridged absent compelling, countervailing, state interests. *Stanley v. Illinois*, 405 U.S. 645 (1972). The state interests in protecting the interests of its citizens and in resolving disputes over competing interests peacefully are equally powerful: indeed, they are essential to our scheme of ordered liberty.

Therefore, the state of Indiana has an interest in considering and protecting the interests of fathers, and particularly of the Petitioner herein, where constitutionally permissible and equitably appropriate. This interest of the state logically extends to the protection of the interests of fathers in their unborn children where equitably justified. This Court should state that there is no constitutional bar to such consideration of a father's interests in appropriate circumstances.

B. The State's interest in protecting the interests of fathers in their unborn children becomes compelling in certain fact situations.

The constitutional analysis employed by this Court in abortion jurisprudence, from *Roe* to the present, has been a substantive due process analysis. Under this analysis, where a right has been found fundamental, the state must show that it has a compelling interest to support any legislation affecting the right, and that the legislation is narrowly tailored to effect only that compelling interest. *Roe*, 410 U.S. at 155.

In the sort of case by case judicial consideration which the Father and Mother received in the Vigo Circuit Court, the narrowly tailored aspect of the test is satisfied. Trial courts are skilled at resolving the common assertions of competing interests as occur regularly in dissolution and custody actions and will act in the most narrowly tailored fashion possible to protect compelling interests and eliminate those which do not rise to the level of being compelling.

In certain circumstances, a state's interest in protecting the interests of fathers in their unborn children rise to the level of being compelling. In such cases, Petitioner asserts that neither *Roe* nor *Danforth* preclude such protection, but that, if this Court finds that they do, then *Roe* and *Danforth* require reconsideration with regard to the proper protection of the interests of the father.

1. Under *Roe v. Wade* and *Planned Parenthood of Central Missouri v. Danforth*, the consideration of paternal interests is appropriate.

a. The right to abortion is not absolute.

In *Roe*, this Court held that the right to abortion is not absolute, 410 U.S. at 153-54. Rather, it is a qualified right "and must be considered against important state interests." *Id.* In addition, the *Roe* Court explicitly declared that it was not considering one of those important state interests, namely paternal rights. *Id.* at 165 n. 67.

b. *Danforth* did not preclude all consideration of paternal rights.

Contrary to the position taken by the Indiana appellate courts, this Court did not preclude all consideration of paternal rights in *Danforth*. The situation in *Danforth* is clearly distinguishable from the case at bar.

First, *Danforth* did not involve judicial consideration of competing interests on a case by case basis. Rather, it dealt with a state statute that gave all husbands an absolute veto, for any or no reason, to the blanket exclusion of their wives. The hus-

band, who might not even be the father, had a unilateral power to forbid an abortion by his wife, for any or no reason, which could not be controverted or reviewed by any higher authority. 428 U.S. at 69, 71. Because the statute required the husband's consent in all cases, the wife could not get an abortion even if her husband could not be located. *Id.* at 69. The state assumed lack of consent by all husbands unless they stated otherwise.

Faced with a statute which permanently and absolutely struck the balance of interests in favor of the husband in every case, this Court held that a "State may not constitutionally require the consent of the spouse, as is specified under [the Missouri statute], as a condition for abortion during the first 12 weeks of pregnancy," *Id.* Thus, this Court struck down a *per se* rule, not case by case consideration of competing interests.[6]

The majority opinion in *Danforth* was careful to clarify, in responding to the dissent by Justice White, that it was not considering the constitutionality of a more nuanced approach, which would allow for case by case consideration of a father's interests in his child. Justice White criticized the Court's decision, claiming that:

> the majority finds in the United States Constitution a rule that the State *must* assign greater value to a mother's decision to cut off a potential human life by abortion than to a father's decision to let it mature into a live child.

Danforth, 428 U.S. at 93 (White, J., dissenting) (emphasis added).

The majority responded:

> This section does much more than insure that the husband participate in the decision whether his wife should have an

[6] At one point, this Court could be misinterpreted to have engaged in balancing. In considering the Missouri spousal consent statute, this Court said: "Inasmuch as it is the woman who physically bears the child and who is the more directly and immediately affected by the pregnancy, as between the two, the balance weighs in her favor," *Danforth*, 428 U.S. at 71. This Court, however, was comparing the effect of leaving the statutory, *per se*, absolute veto intact in every case with the effect of striking it down and leaving the woman free to "act unilaterally." Given the choice between these absolutes, the Court held the rights of the woman must prevail.

> abortion. The state, instead, has determined that the husband's interest in continuing the pregnancy of his wife *always outweighs* any interest on her part in terminating it irrespective of the condition of their marriage. The State, accordingly, has granted him the right to *prevent unilaterally, and for whatever reason*, the effectuation of his wife's and her physician's decision to terminate her pregnancy. This state determination . . . has interposed an absolute obstacle to a woman's decision that *Roe* held to be constitutionally protected from such interference.

Id. at 70-71 n. 11 (emphasis added).

A comparison of the absolute spousal veto rejected in *Danforth* and the judicial inquiry engaged in by the trial court below clearly demonstrates that *Danforth* does not apply to this case.

Danforth described the Missouri statute as having "delegate[d] to a spouse a veto power," which was "delegated authority to a particular person . . . to prevent [an] abortion." *Id.* at 69.

In the instant case, the trial court did not propose to delegate to anyone a "veto power" or to "delegate authority" to the spouse to prevent the abortion. On the contrary, it was the trial court itself which was to weigh the interests of both parties to determine whether or not an abortion should occur.[7]

In addition, it cannot be said that a judicial inquiry is "unilateral," as the *Danforth* Court described the Missouri spousal veto. *Id.* at 70. The judicial inquiry herein is conducted as an adversary proceeding in which both the interests of the mother and the interests of the father would be considered.

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[7] That this Court does not consider a judicial rejected of an abortion decision, under proper circumstances, to be an unconstitutional "veto" is made clear by its opinions relating to parental rights when a minor is seeking an abortion. In *Danforth*, this Court also struck down an "absolute veto" right in parents. *Id.* at 72-79. If this also rejected judicial involvement as well, the question of parental involvement would have been settled in *Danforth*. This, however, is not the case. In subsequent cases, this Court has upheld, both in principle and in fact, state statutes which require a minor to seek parental or judicial consent to an abortion. *Planned Parenthood v. Ashcroft*, 462 U.S. 476, 409-93 (1983). In so doing, this Court rejected the view of the

(footnote continued)

Nor does the trial court below suggest that the father's interest in continuing the pregnancy always outweighs any interest on the mother's part in terminating it, as the Missouri spousal veto statute would have done. *Id.* at 70 n.11. On the contrary, the trial court proposed to weigh the interests of both parties, with the relative weight of the interests to determine the outcome.

In sum, *Danforth* does not control the present case, as it did not consider whether, on a case by case basis, the interests of a father could be considered along with the interests of a mother, as sought in the case at bar.

3. Under a compelling interest analysis, in certain situations a man's interest in his unborn child must be considered compelling.

In some circumstances, the interests of a father in his unborn child (and the interest of the state in protecting his interests) must be considered compelling, so as to justify abridgment of the mother's right to choose an abortion.

While exploration of all the possible situations in which this could be possible is beyond the scope of the present writing, an example is appropriate. In his dissent to *Danforth*, Justice White (joined by Justice Rehnquist) suggests one situation where a father's interest could be found compelling:

> [T]he state is not . . . delegating to the husband the power to vindicate the *State's* interest in the future life of the

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Footnote 7 continued

dissenters that "a parental or *judicial veto* of a minor's decision to obtain an abortion . . . [is] unconstitutional." *Id.* at 504 (Blackmun, J., dissenting) (emphasis added). The requirement of parental or judicial consent was supported, in part, by the right of parents to "the custody, care and nurture" of their children — the very interests at stake in the present case, *Bellotti v. Baird (II)*, 443 U.S. 622, 638 (1979). By providing a judicial forum for the minor to seek authorization for abortion without parental consent, the statute did not "give a third party an absolute, and possibly arbitrary, veto . . . regardless of the reason for withholding the consent." *Id.* at 643. This is so even though the court could refuse consent to the abortion for the minor, if the court found that the desired abortion was not "in her best interests." *Id.* at 644.

> fetus. It is instead recognizing that the husband has an interest of his own in the life of the fetus which should not be extinguished by the unilateral decision of his wife. [footnote omitted] It by no means follows, from the fact that the mother's interest in deciding "whether or not to terminate her pregnancy" outweighs the *State's* interest in the potential life of the fetus, that the husband's interest is also outweighed and may not be protected by the State. A father's interest in having a child — perhaps his only child — may be unmatched by any other interest in his life.

Danforth, 428 U.S. at 93 (White, J., dissenting) (emphasis in original).

In such a situation, where the unborn child was the only child of the father, and perhaps, because of subsequent physical impairment of his reproductive capability, would be his only child, the father's interest would be a powerful one. If such a powerful interest were coupled with relatively weaker reasons asserted by the Mother for desiring an abortion, *e.g.*, the child was to be a girl and she wanted a boy, the interest of the father would have to be considered compelling and rightly protectable by the courts.

However, the Indiana Court of Appeals, relying on *Roe* and *Danforth*, precluded any such possibility. Therefore, this Petition should be granted to establish that, at least in some cases, a father's interests may be found compelling and judicially protected.

4. Under an unduly burdensome or rational basis test, a State may also protect a father's interests in his unborn child in certain circumstances.

If this Court should reject the substantive due process analysis of *Roe*, together with its requirement of a compelling state interest, it seems readily apparent that the same arguments set forth above would allow judicial consideration of paternal interests under any other standard this Court might adopt, *e.g.*, "unduly burdensome," or under the generally applicable

"rational basis" test. At a minimum, if the Court decides, in the near future, to adopt one of these tests as its standard of review for abortion cases, this case should be remanded to the Indiana Court of Appeals for reconsideration in light of the changed standard of review.

C. In this case, the State's interest in protecting the interests of the Petitioner in his unborn child were compelling and were appropriately protected by the trial court.

In the case at bar, Indiana's interest in protecting the interests of the Father in his unborn child was compelling. This is evident from a review of the findings of fact of the trial court.

The Father, in this case, has[8] developed a strong bond with the unborn child[9] and would suffer irreparable harm if she were aborted. The Father deeply loves the Mother and wants to spend the rest of his life with her. They have discussed marriage and planned to be married one day and have children. However, because of his strong feelings about his child, the Father would feel compelled to end their relationship if the Mother obtains the abortion. This fact illustrates the Father's deep attachment to the child and the depth of the grave distress and psychological burden that he would suffer were the child aborted. His family is already looking forward to the addition of a grandchild. The Father and the Mother have discussed names for the unborn child. It is to be named after him, if a boy, or after her, if a girl (with his mother's name for a middle name). Findings of Fact 6, 7, Record 42, 147, 150-51, 155, 158-59.

Initially, the couple excluded sexual relations from their relationship. When they began having sexual relations, they initially took measures to prevent conception. This was ended at the Mother's request. The Mother is familiar with contracep-

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[8] The events are necessarily presented prospectively although, of course, they have already transpired.

[9] To avoid the awkward inclusion of both male and female pronouns to refer to the unborn child, the use of the female pronoun will be adopted herein.

tive measures, having previously employed several of them, but chose not to use them in her sexual relations with the Father. Findings of Fact 4, 5, Record 42, 136, 139-41.

The record further demonstrates that the Father is willing and able to provide the necessary support and care for his child, and has offered to marry the Mother and raise their child together. He has even offered to take full custody and responsibility for the child upon birth and is willing and able to pay all necessary expenses related to prenatal care and childbirth of their child. Findings of Fact 7, 8, Record 42.

Balanced against these interests are the interests of the Mother. The Mother has expressed a desire for an abortion because she does not want to share the Father with anyone. Finding of Fact 14. However, the Father feels that he could not continue their relationship if she obtains an abortion. As the Father is willing to take custody of the child, the Mother would not have to share any future boyfriends with the child should the current relationship not work out. Finding of Fact 14.

The Mother has expressed a desire for an abortion because she wants to look nice in a bathing suit during the summer, and not to be pregnant during the summer because of her social plans. Finding of Fact 14. Balanced against the Father's powerful interests in the care, custody, control, and companionship of his child, this is a relatively insubstantial consideration, bordering on the frivolous.

The Mother has expressed a desire for an abortion because she does not want to undergo the discomfort of childbirth. Finding of Fact 14. However, she has stated that she does hope to have children some day, which lessens this concern as a factor — it becomes, instead, a matter of timing. Further, there is discomfort associated with abortion. Balanced against the parental and procreational interests of the father, this is a relatively insubstantial consideration.

Additionally, the Mother has expressed no interest in further schooling or employment, but, were she to do so, the child would not be present to hinder or prevent her plans in any way,

since the Father is willing to take custody of and provide full support for the child. The Mother has no other children, nor are there any others living at home with her mother, with whom she lives. Thus, there will be no unwanted child and no overburdening of any already existing family structure. Also, the stigma of unwed motherhood has diminished dramatically since 1973, when *Roe* was decided, and there is no evidence that the Mother in this case would be conscious of such a stigma. Findings of Fact 12-15.

The trial court took all these factors into consideration when it issued the permanent injunction against the performance of the abortion. On balance, the court properly found the Father's interests in his child in this particular case far outweigh the Mother's interest in abortion.

On the basis of these considerations, it may be seen that this Court may uphold the judgment of the trial court on the basis that the state had a compelling interest in protecting the interests of the Father in his child which made the abridgment of her choice of abortion appropriate. Because of the erroneous interpretation of this Court's holdings in *Roe* and *Danforth*, the Indiana appellate courts were precluded from affirming the trial court, as well.

This Court should accept this case for review to correct the erroneous notion that *Roe* and *Danforth* preclude the consideration of paternal rights in cases involving competing interests relating to abortion, and that, in appropriate cases, the interests of a father may be found compelling.

CONCLUSION

WHEREFORE, Petitioner John Smith respectfully requests this Court to issue a writ of certiorari to review the decision of the Indiana Court of Appeals.

Respectfully submitted,

James Bopp, Jr.
Counsel of Record
Richard E. Coleson
Counsel for Petitioner

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State of Indiana

CLERK OF THE SUPREME COURT
COURT OF APPEALS AND TAX COURT

SEAL

INDIANAPOLIS, 46204

DANIEL ROCK HEISER, CLERK
217 STATE HOUSE

TELEPHONE 317-232-1930

JAMES BOPP JR.
191 Harding Avenue
P.O. Box 410
Terre Haute, IN 47808-0410

[list of counsel omitted]

Cause Number
84A01-8804-CV-00112
LOWER CAUSE
84CO18804JP00185

JANE DOE

v.

JOHN SMITH

You are hereby notified that the COURT OF APPEALS has on this day October 24, 1988, issued the enclosed opinion.

WITNESS my name and the seal of said Court, this 24th day of October, 1988

/s/ Daniel Rock Heiser
Clerk Supreme Court,
Court of Appeals and Tax Court

IN THE
COURT OF APPEALS OF INDIANA
FIRST DISTRICT

JANE DOE,	)	
	)	
Defendant-Appellant,	)	
	)	
vs.	)	No. 84A01-8804-CV-00112
	)	
JOHN SMITH,	)	
	)	
Plaintiff-Appellee.	)	

APPEAL FROM THE VIGO CIRCUIT COURT
JUVENILE DIVISION
The Honorable Robert H. Brown, Judge
Cause No. 84C01-8804-JP-185

RATLIFF, C.J.

MEMORANDUM DECISION

At the instance of the putative father, the trial court issued an injunction permanently enjoining Jane Doe, an unmarried pregnant woman, from obtaining an abortion to terminate her pregnancy which was then in the first trimester. Doe appeals from the issuance of such injunction. We reverse.

Both parties argue this case is not moot although it is conceded that Doe, in disobeyance of the injunction, obtained the abortion. The parties contend this case falls within the well recognized exception to the mootness doctrine of a matter of great public importance and likely to recur and yet evade review. *See, e.g., Indiana Educ. Employment Relation Bd. v. Mill Creek Classroom Teachers Assn'n* (1983), Ind., 456

N.E.2d 709; *Haggerty v. Bloomington Bd. of Pub. Safety* (1985), Ind. App., 474 N.E.2d 114. In addition, Smith contends that the case is not moot because Doe is still subject to contempt proceedings for violating the injunction.[1] For the purposes of this opinion, we will assume that this case is not subject to dismissal as being moot.

The issues presented in this case were decided in favor of Doe's position in *Conn v. Conn* (1988), Ind., 526 N.E. 2d 958 (Pivarnik, J., dissenting) wherein our supreme court adopted our opinion in *Conn v. Conn* (1988), Ind. App., 525 N.E.2d 612; and *Doe v. Smith* (1988), Ind., 527 N.E.2d 177 (Pivarnik, J., dissenting). Those cases are controlling here.[2] The issuance of the injunction was error.

Judgment reversed.

ROBERTSON, J. and NEAL, J., concur.

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[1]Doe argues she has a continuing legal interest because of the likelihood of a contempt proceeding. She also contends she cannot be adjudged in contempt because the trial court had no jurisdiction to issue the injunction and because the injunction was "transparently invalid." She cites, among other cases, *Walker v. City of Birmingham* (1967), 388 U.S. 307, 87 S. Ct. 1824, 18 L. Ed. 2d 1210. No issue of contempt being before us in this action, we decline to express an opinion on that issue.

[2]Counsel for Smith argues that *Conn v. Conn*, *supra*, was wrongly decided. We do not agree. Further, as counsel should know, it is not within our power to overrule our supreme court or to ignore its pronouncements which are binding on us.

State of Indiana

CLERK OF THE SUPREME COURT AND COURT OF APPEALS

SEAL

INDIANAPOLIS, 46204

DANIEL ROCK HEISER, CLERK
217 STATE HOUSE

TELEPHONE 317-232-1930

No. 84A01-8804-CV112
JANE DOE

VS.

JOHN SMITH

You are hereby notified that the Supreme Court has on this day Appellees petition for transfer is hereby Denied.
Randall T. Shepard, Chief Justice.
All Justices Concur. TS

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 9th day of February, 1989.

/s/ Daniel Rock Heiser
Clerk Supreme Court and
Court of Appeals

No. _____

Richard E. Coleson

I hereby acknowledge receipt
of the above notice

_____
Signature

Date _____, 19 _____

Attorney for ☐ Appellant
☐ Appellee

VIGO CIRCUIT COURT
1988 TERM

IN THE MATTER OF THE
UNBORN CHILD [H] NO. 84C01 8804 JP 185

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

FINDINGS OF FACT

The Court, having heard the evidence and being duly advised, now makes the following findings of fact:

1. The Petitioner, [John Smith], age 24, gave credible testimony, none of which was controverted.

2. [Witness One, Witness Two, and Witness Three], each gave credible uncontroverted testimony.

3. The evidence is clear and convincing that the Petitioner is the father and the Respondent, [Jane Doe], is the mother of a child conceived out of wedlock during the latter part of January, 1988 or the early part of February, 1988.

4. That the Respondent's last menstrual period ended during the last part of the second week of January, 1988, immediately following which until April 3, 1988, the parties herein engaged in many, many acts of sexual intercourse. The last such act occurring the day immediately preceding the institution of this litigation.

5. Respondent was familiar with some methods of birth control having in the past used the "pill" and with condoms, as indicated by the use of condoms by Petitioner the first two or three acts of sexual intercourse with Respondent. After a few occasions, at the request of the Respondent, coitus interruptus was discontinued after two or three occasions immediately after the discontinuance of the use of condoms by the parties.

6. After being medically assured of the fact of pregnancy, the parties discussed between themselves names for the

expected child; Petitioner's name in case of a male child and perhaps [Jane], after Respondent and with the middle name [ ] being taken from the name of the Petitioner's mother, if the expected child were female.

7. Petitioner is anxious to and capable of caring for the expected child and has numerous promises of assistance, if needed, from both of his parents as well as many other of his family members.

8. Petitioner is in love with Respondent.

9. There is no evidence that any physician has made a decision based on his or her medical judgment that an abortion should be had by the Respondent.

10. There is no evidence of any harm, medically diagnosed or otherwise that would befall the Respondent if she gave birth to the child she now carries.

11. There is no evidence that maternity may force upon the Respondent either a distressful life or future.

12. The Respondent, not being in school, being unemployed, and intending to remain that way, and intending to continue living with her mother, the continuance of her pregnancy would not interfere with either her employment or education.

13. There is no evidence that the mental or physical health of the Respondent may in any way be taxed by child care.

14. There is no evidence of distress for concerned persons associated with this child except that the Respondent wishes to avoid childbirth, she wishes to look nice in a bathing suit this summer, her desire not to be pregnant in the **summertime**, and her desire not to share the petitioner with the baby.

15. There is no evidence that the Respondent would be stigmatized by unwed motherhood.

16. There is no evidence that a responsible physician has considered or discussed the above or any other factors in consultation with the Respondent.

17. There is no evidence that the child would be brought into a family already unable, physically or otherwise, to care for him or her. Au contraire, the Court finds the petitioner both able and willing to provide a suitable home for the child.

18. The appearance and demeanor of the Respondent in the courtroom, as observed by the court, indicated that she is a very pleasant young lady, slender in stature, healthy, and well able to carry a baby to delivery without an undue burden.

CONCLUSIONS OF LAW

1. Indiana Code 31-6-6.1-2(a)(2) (A paternity action may be filed by . . . a man alleged . . . that he is the expectant father of an unborn child) confers jurisdiction on this court to entertain this Petition to Establish Paternity.

2. The evidence is clear and convincing that the Petitioner has standing to request injunctive relief (Indiana Rules of Court, TR 65).

3. The Petitioner is the father and a fit and proper person to have the care and custody of the child herein.

4. Indiana law is clear that fathers have rights to have children, including the right to have the care and custody thereof.

5. Balancing the rights of the mother with the rights of the father is certainly an appropriate judicial function when such rights are in conflict.

6. There are no Indiana statutes covering the issues here involved.

7. The rights of fathers are derived from the common law in Indiana and not from state action.

8. The 14th Amendment to the United States Constitution applies only to state action. Roe v. Wade, 410 US 113, (1972).

9. The Order of this Court, enforcing the rights of the father, does not constitute state action.

10. The balancing of the rights of the father to have his unborn child with the rights of the mother to abort, on the basis

of the facts found above, in this particular case, the rights of the father outweigh the rights of the mother.

11. The rights of the father in his unborn children are of constitutional dimensions under the 14th and 9th Amendments to the United States Constitution as well as being derived from the Indiana common law. Those constitutional rights of the father outweigh the constitutional rights of the mother.

12. Planned Parenthood of Missouri vs. Danforth, 428 US 52, (1975), involved a state statute and a marriage relationship, neither of which are here involved and accordingly is not dispositive of the instant case.

13. Factors considered in Roe v. Wade do not exist here where the mother was relying on abortion rather than conception. That fact, and her other reasons for abortion are indicative of an extremely immature young woman which lessens the weight and nature of her privacy interest. See Findings of Fact Numbered 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18.

14. The interests of the father not having his child born are cognizable, substantial, and enforceable rights.

ORDER

Upon the basis of the Court's Findings of Facts and Conclusions of Law, the Court hereby Adjudges, Orders and Decrees that:

(a) The mother is hereby permanently restrained from having an abortion to terminate the unborn child she is now carrying;

(b) The Mother is ordered to provide a copy of this Court's Order to any physician, abortion clinic, abortion facility, or pregnancy counseling organization, or any employee thereof, which she might consult regarding her unborn child or the termination of her pregnancy;

(c) any physician, abortion clinic, abortion facility, or pregnancy counseling organization, or employee thereof, with notice of this Order, is hereby restrained from performing an abortion on the Mother;

(d) nothing in this Order shall prohibit the termination of the Mother's pregnancy in a medical emergency in a circumstance which precludes prior resort to this Court;

(e) the Father is ordered to pay for all reasonable and necessary medical expenses for the Mother and the unborn child related to the prenatal care, child birth and delivery of the unborn child;

(f) this Order shall terminate two weeks after the spontaneous abortion, an induced abortion under paragraph (d) of this Order, or delivery of the unborn child herein;

(g) the final hearing in this cause shall be continued until after the birth of the unborn child herein;

(h) the parties shall promptly notify the Court of the spontaneous abortion, an induced abortion under paragraph (d) of this Order, or the delivery of the unborn child herein;

(i) this is a final judgment and Order with respect to all the paragraphs of this Order, except paragraphs (e) and (g);

(j) the parties and their counsel are hereby restrained from public disclosure of the identities of the parties, the unborn child, and witnesses in this case; and

(k) upon any appeal of this Order, the captions of the cause shall be In the Matter of the Unborn Child H. and all reference to the names of the parties, the unborn child and witnesses shall be deleted.

Ordered and decreed this 8th day of April, 1988.

/s/ Robert Howard Brown
Robert Howard Brown, Judge

VIGO CIRCUIT COURT
1988 TERM

IN THE MATTER OF THE
UNBORN CHILD [H] NO. 84C01 8804 JP 185

ORDER

The Court now amends its Conclusions of Law so that Item 8 now reads: The 14th Amendment to the United States Constitution applies only to state action. Roe v. Wade, 410 US 113, (1972).

Item 11 is amended to read: The rights of the father in his unborn children are of constitutional dimensions under the 14th and 9th Amendments to the United States Constitution as well as being derived from the Indiana common law. Those constitutional rights of the father outweigh the constitutional rights of the mother, on the basis of the facts found above in this particular case.

Item 13 is amended to read: Factors considered in Roe v. Wade do not exist here where the mother was relying on abortion rather than conception. That fact, and her other reasons for abortion are indicative of an extremely immature young woman which lessens the weight and nature of her privacy interest. See Findings of Facts Numbered 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18.

SO ORDERED, this 11th day of April, 1988.

/s/ Robert Howard Brown
Robert Howard Brown, Judge